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Supreme Court of the United States.

October Term, 1964.

No. [redacted]171

EDDIE V. HANNA,
Petitioner,

v.

EDWARD M. PLUMER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Supreme Court of the United States.

October Term, 1964.

No. 1206.

EDDIE V. HANNA,
Petitioner,

v.

EDWARD M. PLUMER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Jurisdiction.

Jurisdiction of the original case is founded in diversity of citizenship between defendant and plaintiff.

Question Presented.

Whether, in a diversity case, the courts of the United States, in enforcing a claim against the executor of a decedent's estate, are required to give full effect to the applicable state law relative to the settlement of estates, requirements of service on an executor and Statute of Limitations.

Statement of the Case.

The petitioner, a resident of Ohio, brings this action against the respondent, a resident of Massachusetts, as he

is executor under the will of a Massachusetts testatrix. The executor was duly appointed and qualified by giving bond on March 1, 1962, in the Probate Court for Essex County.

On April 25, 1962, before the action was brought, the plaintiff, through her attorneys, filed in the Probate Court a form purporting to be a "Notice of Claim" and purporting to be filed under General Laws, c. 202, § 20, and General Laws, c. 197, § 9.

The printed language in the form relating to the court in which action had been brought was stricken from the form, and no statement of the court in which action had been brought was included.

Thereafter, prior to March 1, 1963, the complaint was filed in the United States District Court for the District of Massachusetts. The respondent has not accepted service and the only purported service was by the United States Marshal's leaving a copy of process at the last and usual abode of the respondent. No notice stating the court in which the action has been brought has ever been filed in the Registry of Probate. The Massachusetts statute requires a creditor enforcing a claim against an executor or administrator to give specific notice within the year of administration in any one of three ways: (1) by service in hand on the executor; (2) by the executor's accepting service; or (3) by ordinary service plus a notice filed in the Probate Court within one year stating the court in which action has been brought.

Argument.

The pertinent parts of General Laws, c. 197, § 9, are as follows:

> ". . . an executor . . . shall not be held to answer to an action by a creditor of the deceased . . . which

> is commenced within [one] year [from the time of his giving bond] unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor . . . or service thereof accepted by him or a notice stating . . . the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ." (As amended by St. 1954, c. 552, § 1.)

The petitioner now concedes that she had not complied with the requirements of the Massachusetts statute.

She argues, however, that service at the "last and usual" should be sufficient because of Federal Rules of Civil Procedure, Rule 4(d)(1). This ignores completely the obvious requirement of the statute that an executor is entitled to be specifically notified of the action so that he will not distribute the estate at the end of the year of his administration and thus render his personal assets liable to a judgment by a creditor. The Massachusetts statute does not require that service may be made only in hand, as petitioner's brief assumes, but merely permits this as one of three different ways of ensuring personal notification to the executor in time to keep him from distributing the assets of the estate. Service at the last and usual may be sufficient provided the plaintiff also files the requisite notice. It is a matter of substance that the executor should know of any action against an estate; otherwise he may be liable to a creditor for the entire assets of the estate he has distributed—a far more serious substantive matter than mere costs of suit. This court has held that a state statutory requirement of posting a bond to cover court costs must be followed by the federal courts. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

The Massachusetts statute applies. This action, brought against an executor in the United States District Court by reason of the diversity of citizenship of the parties, is subject to the provisions of the Massachusetts statutes relating to service on executors (General Laws, c. 197, § 9).

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530.

Doyle v. *Moylan*, D.C. Mass., C.A. 54-507-A.

Doyle v. *Moylan* (D.C. Mass.), 141 F. Supp. 95.

It is clearly established in the decision of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, that the federal courts must follow the state law and recognize and enforce any legal defense to an action at law brought in that state. If recovery cannot be had by a party because the action was brought in violation of the Statute of Limitations or because all necessary elements to maintain said action within the state have not been complied with, the action cannot be maintained in the federal court.

The doctrine established by the *Erie* case has been since confirmed in the case of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, where the court held that, in a suit in equity in a federal court to recover upon a state-created right, jurisdiction being based solely upon diversity of citizenship of the parties, a recovery cannot be had in the federal court if a state Statute of Limitations would have barred recovery had the suit been brought in a state court.

In the case of *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, an action was brought in the United States Court involving a highway accident which occurred in Kansas on October 1, 1943. The petitioner's complaint was filed in the United States District Court on September 4, 1945, but service of process was not made until December 28, 1945. The Statute of Limitations of the State of

Kansas provided that such an action should be brought within two years from the date of the accident. Under the Federal Rules of Civil Procedure an action is commenced upon the filing of the complaint with the court. The Supreme Court of the United States in this case held that, even though the suit was properly brought under the Federal Rules of Civil Procedure, it was nevertheless barred by virtue of the Statute of Limitations of the State of Kansas, which required service of the summons within the two-year period.

The court said at page 532:

> "It is conceded that if the present case were in a Kansas court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held. The force of that reasoning is sought to be avoided by the argument that the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co.* v. *Tompkins* does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.
>
> "That was the reasoning and result in *Bomar* v. *Keyes* [C.C.A. 2d N.Y.], 162 F. 2d 136, 141. But that case was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. [Cases cited.] It

accrues and comes to an end when local law so declares. [Case cited.] *Guaranty Trust Co.* v. *York* [326 U.S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A.L.R. 1231], *supra*. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed."

Clearly, the principles stated above govern the case at bar. On March 1, 1963, the period provided by the Massachusetts short Statute of Limitations had expired. On that day the plaintiff would have had no enforceable rights against the defendant had this action been brought in a state court. Consequently, the action cannot be enforced in the federal court.

There is excellent reason why the state law regarding suits against executors should be followed strictly. By state law, an executor who has not been served in hand and may thus not have personal knowledge of the suit can check the record at the Probate Court, and, if he finds no notice that any suit has been commenced against him, he is safe, under General Laws c. 197, § 9, in making distribution of the estate. In fact, if he does not make immediate distribution, he renders himself liable to pay interest on the legacies.

Kent v. *Dunham* 106 Mass. 586.
Claflin v. *Holmes*, 202 Mass. 157.

Thus, at the end of his year of administration, the executor must make a decision. Should he change his position by making distribution, or should he hold on to the assets of the estate indefinitely, paying interest all the time for the delay? Clearly, the law should, and does,

require that executors be allowed to make "speedy settlement of estates." *Brown* v. *Anderson*, 13 Mass. 201, 202. In the case at bar, on March 2, 1963, the executor would have been correct under Massachusetts law in checking the Probate Court record, and then in making distribution to the legatees. His right to do so—indeed, his legal duty to do so, if he wished to avoid paying interest—was a substantive right, a substantive duty. On March 2, 1963, the property rights of the legatees, as well as of the executor, were fixed. Should the mere fact that the plaintiff chose the federal rather than the state court be allowed to change that?

In the case of *Zuckerman* v. *McCulley*, 170 F. 2d 1015, an action had been brought in a federal District Court in Missouri against a Missouri executrix. A Missouri statute provided that demands against estates be legally exhibited within one year. As in the Massachusetts statute, exhibiting could be done by service on the executor or by an alternate method of notice of claim. The plaintiff commenced his action in the federal court within the year in compliance with Rule 3 of the Federal Rules of Civil Procedure, but did not obtain service of process within the year. In dismissing the action the court said, at page 1018:

> "It is settled law that a non-resident, seeking in a federal court to establish a claim against the estate of a decedent, is in no better or different position than a local creditor attempting to establish such a claim in the courts of the State. The federal court is required to give full effect to the applicable State law relative to the settlement of such estates. Security Trust Co. v. Black River National Bank, 187 U.S. 211, 227-231, 23 S. Ct. 52, 47 L. Ed. 147.

"It is our opinion that state statutes fixing the time and manner for the exhibition of demands against estates of deceased persons and providing that claims not so presented shall be barred, are not purely procedural, but are laws limiting the rights of parties (Security Trust Co. v. Black River National Bank, supra, page 231 of 187 U.S., page 59 of 23 S. Ct.), and are not affected or amended by Rule 3 of the Federal Rules of Civil Procedure."

In the case of *Security Trust Co.* v. *Black River National Bank* (cited above), 187 U.S. at page 227, the United States Supreme Court said:

"Some general principles have become so well settled as to require only to be stated. . . .

. . . . . .

"Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals. *Aspden* v. *Nixon,* 4 How. 467, 498."

The Supreme Court stated, at page 229, quoting *Yonley* v. *Lavender,* 21 Wall. 276:

"The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

The court further stated, at page 229:

"In *Pulliam* v. *Pulliam,* 10 Fed. Rep. 53, 78, the distinction between ordinary statutes of limitation and

statutes of administration of the estates of decedents limiting the time within which creditors must prove their claims, is pointed out in the respect that the latter are rules of property as well as statutes of limitation . . ."

The court also stated, at page 237:

". . . the courts of the United States, when exercising jurisdiction over executors and administrators of the estates of decedents within a State, are administering the laws of that State, and are bound by the same rules which govern the local tribunals . . ."

In the case of *Netermeyer* v. *Henley,* 205 F. Supp. 734, decided in 1962 in the District Court of North Dakota, the plaintiff duly filed his complaint within the year provided by the Statute of Limitations. Through the negligence of the clerk in the District Court process was not issued until after the year had expired. The state statute provided that suit was commenced when process was issued. It is respectfully submitted that the routine issuance of process by a clerk is less important in the enforcement of a right than is the requirement of service in hand on an administrator, yet in this case the court held that the state statute took precedence over the Federal Rules of Civil Procedure and held that the action was barred by the state statute.

The court further stated, at page 737:

"The paramount consideration in cases before this Court where jurisdiction is founded solely on diversity is whether the litigant may be placed in a better or more advantageous position in the federal court than he could have enjoyed in the state court. It is now well settled that such a result would not be permitted."

Exactly the same result was reached in a substantially similar set of facts by a North Carolina District Court in the case of *Rios* v. *Drennan*, 209 F. Supp. 927.

Obviously, if the petitioner is permitted to maintain this action in a federal court, she is accomplishing a result which clearly is unobtainable in the state court.

Conclusion.

It is clear, and the petitioner concedes, that, had this action been brought in a state court rather than a federal court, the plaintiff would be barred because of the requirements of the Massachusetts statutes. It is also clear that the rights given by the Massachusetts statutes are substantive and that, this being a diversity case, the Federal District Court and the Circuit Court of Appeals for the First Circuit are correct in applying the doctrine of *Erie Railroad Co.* v. *Tompkins* in holding that the petitioner was likewise barred in the federal court. The respondent therefore respectfully submits that a writ for certiorari should not be granted, and that the petition for same should be denied.

Respectfully submitted,

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